

Letter of Findings: 04-20150659
Gross Retail Tax
For the Years 2011, 2012, and 2013

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Convenience Store presented evidence that it sold scratch-off lottery tickets to its customers, that sales of the tickets were not subject to sales tax, and a review of its sales tax assessment was warranted. However, Convenience Store was unable to establish that its purchase of gas pumps and a refrigerated cooler were not subject to use tax.

ISSUE

I. Gross Retail Sales - Exempt Transactions.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2-5-4-1; IC § 6-2.5-5 et seq.; IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that it sold items at its convenience store which were not subject to sales tax and that its purchase of a refrigerated cooler and gas pumps were not subject to Indiana's use tax.

STATEMENT OF FACTS

Taxpayer operates a combination gas station and convenience store. The store is located in Indiana. Taxpayer's convenience store sells groceries, beverages, newspapers, fuel, lottery tickets, various tobacco products, and other items.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records. Taxpayer was asked to provide cash register tapes, bank records, and purchase invoices in order to verify the store's original sales tax filings. Taxpayer was unable to provide any of the requested records.

The Department determined that five percent of Taxpayer's non-fuel sales were exempt. According to the audit report, "This percentage is utilized by the Department based upon experience with this type of industry."

In addition, the audit found that Taxpayer had purchased certain capital assets for which no sales tax was paid. The audit assessed use tax on these capital assets.

The audit resulted in an assessment of additional sales and use tax. Taxpayer disagreed arguing that the audit was incorrect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Finding results.

I. Gross Retail Sales - Exempt Transactions.

DISCUSSION

Taxpayer argues that the audit improperly assessed sales tax on its sales of "scratch-off" lottery tickets and use tax on the purchase of a refrigerated cooler and gas pumps.

As a threshold issue, it is the Taxpayer's responsibility to establish that the tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for

the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC §§ 6-2.5-5 et seq. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2.5-4-1. A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

It should be pointed out that, "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for tax by reviewing those books and records." IC § 6-8.1-5-4(a). In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." IC § 6-8.1-5-4(c). Taxpayer failed in its responsibility to maintain or allow for inspection of its purchases, sales, or bank records. The audit assessment *[sic]* is necessarily based on the "best information available" to the Department at the time the audit was conducted.

Taxpayer presented evidence that it sold "scratch-off" lottery tickets to its customers and that, as a routine matter, Taxpayer was not required to charge sales tax on those sales. The Department's Audit Division is requested to review the documentation of those lottery ticket sales and to make whatever adjustments to the assessment are appropriate because the sales of the scratch-off tickets were not subject to sales or use tax.

The Department is not prepared to agree that Taxpayer's purchase of the refrigerated cooler and gas pumps were not subject to Indiana's use tax. The documentation Taxpayer presented on those sales is ambiguous at best because the documentation does not establish that Taxpayer paid sales tax at the time the items were purchased, does not establish that Taxpayer has self-assessed use tax on the price paid for the items, and does not establish that the items are exempt from either sales or use tax. Taxpayer failed to meet its statutory burden of establishing that the assessment of tax on these capital items was wrong. Taxpayer acquired those items and there is insufficient evidence that use tax was ever paid.

FINDING

Taxpayer's protest is denied in part and - subject to the Audit Division's review of its lottery sales - is sustained in part.

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